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In the Supreme Court of the United States

OCTOBER TERM, 1958

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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No. 488

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On April 21, 1955, petitioner was convicted, following a trial by jury in the United States District Court for the Middle District of North Carolina, under the so-called "membership clause" of the Smith Act, 18 U. S. C. 2385, proscribing being or becoming a member of a society, group, or assembly of persons who teach, advocate, or encourage the overthrow by violence of the Government of the United States, knowing the purposes thereof. He was sentenced to six years' imprisonment. On appeal to the Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed on November 7, 1955, *Scales* v. *United States*, 227 F. 2d 581.

On March 26, 1956, this Court granted certiorari. 350 U. S. 992. The petition for the writ urged four

questions—(1) whether the "membership clause" the Smith Act is unconstitutional on its face or as plied; (2) whether the indictment charges an offe under the laws of the United States in view of Secti 4 (f) of the Internal Security Act of 1950 (50 U. S. 783 (f)), providing that neither the holding of of nor membership in any Communist organization sh constitute *per se* a violation of that or any other crim nal statute; (3) whether the evidence was sufficie to support the conviction; and (4) whether, "in fo particular and important respects", petitioner w denied a fair trial (No. 626, Oct. Term, 1955 [No. Oct. Term, 1956; No. 3, Oct. Term, 1957], p. 2). E compassed in the fourth question were the followi subsidiary questions—(a) whether the grand ju was illegally impanelled; (b) whether the "Congr sional findings" in the Communist Control Act 1954 (50 U. S. C., Supp. V, 841) and the Internal S curity Act of 1950 (50 U. S. C. 781) deprived pe tioner of a fair trial; (c) whether the trial court err in denying petitioner's request to examine certain wr ten statements previously furnished to the FBI two prosecution witnesses (this being substantially t same production-of-documents issue which was rais and subsequently decided in *Jencks* v. *United Stat* 353 U. S. 657); and (d) whether certain allegedly "i competent, irrelevant, remote and inflammatory" te timony was received (*id.*, pp. 20–24).

Following the submission of briefs on the merits a oral argument, this Court, on June 3, 1957, entere an order restoring the case to the docket for r

argument. 353 U. S. 979.[1] In September 1957, the Government filed a supplemental memorandum which, *inter alia*, pointed out that petitioner in this case, as well as the petitioner in the *Lightfoot* case, was entitled (at least) to a new trial under the rationale of the *Jencks* decision, 353 U. S. 657 (Supplemental Memorandum for the United States on Reargument, Nos. 3 and 4, Oct. Term, 1957, pp. 1–2). On October 14, 1957, this Court, citing its *Jencks* decision, 353 U. S. 657, entered an order reversing the Fourth Circuit's affirmance of petitioner's conviction "[u]pon consideration of the entire record and the confession of error by the Solicitor General". *Scales* v. *United States*, 355 U. S. 1.[2]

Petitioner was thereafter re-tried and, on February 21, 1958, again convicted (Tr. 2217). At the second trial, the procedure followed with respect to the production for defense use of prior statements to the FBI by prosecution witnesses was—with a qualification to be mentioned below (*infra*, p. 9)—that prescribed by 18 U. S. C. 3500, as added by Public Law 85–269, approved September 2, 1957 (71 Stat. 595)—popularly known as the Jencks Act.[3] Petitioner was again sentenced to six years' imprisonment, and, on appeal to the Court of Appeals for the Fourth Circuit, the judg-

[1] "Similar action was taken on the same date with respect to a companion case from the Seventh Circuit involving the membership clause". *Lightfoot* v. *United States*, 353 U. S. 979.

[2] The same action was taken, on the same date, in the *Lightfoot* case. *Lightfoot* v. *United States*, 355 U. S. 2.

[3] The provisions of this Act are set forth at Pet. App. 88–89.

ment of conviction was, on October 6, 1958, affirm
The present petition for a writ of certiorari seek
view of this judgment.

I

With the exception of the question of the cons
tionality of the Jencks Act (Pet. 27–28), the quest
raised by petitioner are substantially the same as t
raised by him in the former petition.[5] We do not
pose the granting of the petition for a writ
certiorari on any point other than that issue.

II

1. Petitioner's first challenge to the constitut
ality of the Jencks Act (18 U. S. C. 3500, set f
at Pet. App. 88–89) relates to subsection (c). T
subsection provides, in pertinent part, that "[i]f
United States claims that any statement ordere
be produced under this section"—*i. e.*, any state
(as defined in subsection (e)) of a prosecution
ness in the possession of the United States w

[4] The Fourth Circuit's second opinion, which has no
been reported, appears at Pet. App. 31–81.

[5] Compare the present "Questions Presented" (Pet. 2; an
Pet. 24–30) with the questions urged in the former pe
(No. 626, Oct. Term, 1955 [No. 29, Oct. Term, 1956; No. 3,
Term, 1957], pp. 2, 20–24 (summarized at p. 2, *supra*.).
the evidence adduced at the second trial, the sufficiency of
is challenged here, is not identical with the evidence ad
at the first trial, it is sufficiently similar that there c
be said to be reasons for excluding the sufficiency of th
dence issue at this time which did not equally apply previ
and the prior grant of certiorari included that issue.
summary of the evidence adduced at the second trial, s
opinion below at Pet. App. 43–63.

"relates to the subject matter as to which the witness has testified"—"contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use * * *." Petitioner argues that this statutory procedure is not reconcilable with this Court's holding in the *Jencks* case, 353 U. S. 657, and is unconstitutional.

Even if the *Jencks* decision is based on constitutional grounds, however (and we do not agree that it is, see *infra*, pp. 7–8), the statutory procedure is fully consonant with *Jencks*.

It is clear that the mere fact that a government witness has in the past given a statement or statements to a government agent or agents on matters relating to the subject matter of his trial testimony would not require that *all* past statements by this witness to government agents—on any subject whatever—be turned over to the defense. Petitioner makes no such claim and the *Jencks* decision makes no such suggestion. It is only statements which *relate to the subject matter of the witness' testimony* that must be turned over. But there is obviously no more reason for turning over to the defense non-germane portions of a witness' statement which is in part germane (because it touches on—but only in

part—the subject matter of his testimony) than there is for turning over a statement *no* part of which is pertinent to that subject matter. The defendant is fully protected against the possibility of an erroneous or arbitrary ruling by the trial judge as to the non-germane portions of a statement germane in part. He is entitled under subsection (c) (see Pet. App. 88–89) if he so desires—and the procedure indicated was followed here (see opinion below, Pet. App. 74)—to have the entire statement preserved for inspection by the appellate court in the event that he is convicted and elects to appeal. The statutory procedure thus fully protects the accused's impeachment rights while at the same time safeguarding the privacy of government records in which the accused has no proper interest.

Petitioner quotes from the *Jencks* opinion (Pet. 27–28) language which he claims supports his contention that that decision holds that statements to a government agent by an informant-witness which are relevant in part (because they refer in part to matters concerning which he has given testimony) must be made available to the defense in their entirety for potential cross-examination purposes. That language must be read and interpreted, however, in the light of the underlying considerations to which we have adverted. So read, we submit that it gives no support to petitioner's argument. The thrust of that language, as of the decision, is that only the defense can adequately appraise the value for impeachment purposes of statements of an informant-witness which *in fact* touch upon or relate to a matter concerning which he

has testified. But the question of whether a statement of the witness relates to a topical area with respect to which he has testified is a question of fact which the judge is well able to decide without assistance from the defense.

What we have said has assumed, *arguendo,* that the *Jencks* decision was based on constitutional grounds of due process. We believe, however, that this Court did not in that case purport to lay down a basic rule of constitutional law, but rather (pursuant to its general supervisory powers over the administration of justice in the federal courts) a procedural principle, in the nature of a rule of evidence, to be applicable in all federal criminal trials in the absence of a definitive statute. In holding that the trial court had erred in failing to order the production of the statements of Ford and Matusow, this Court said that it was following its prior decision in *Gordon* v. *United States,* 344 U. S. 414. It clarified that decision by holding that (contrary to the views of the lower courts in *Jencks*) "a preliminary showing of inconsistency" between the witness' testimony and his prior statement was not, under *Gordon,* "a prerequisite to" the accused's right to inspect the prior statement (353 U. S. at 666–667). But *Gordon* makes very clear that it was decided, not on constitutional principles, but on the basis of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" and "[*i*]*n the absence of specific legislation*" (344 U. S. at 418; emphasis added). It would follow, therefore, that the *Jencks* decision likewise was based on common law prin-

ciples, as interpreted in the light of reason and experience, and did not purport to lay down a fundamental principle of due process, beyond the power of Congress to alter or amend by legislation.*

2. The second respect in which petitioner challenges the constitutionality of Section 3500 relates to the definition of "statement" in subsection (e). The term is there defined as (Pet. App. 89)—

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

This definition, petitioner argues, "is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently 'approved' them and whether or not they are 'substantially verbatim' or 'recorded simultaneously' " (Pet. 28).

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* This conclusion has the support of such decisions as *United States* v. *Lev*, pending on petition for a writ of certiorari to the Court of Appeals for the Second Circuit (Nos. 435, 436, 437); *United States* v. *Gandia*, 255 F. 2d 454 (C. A. 2); *United States* v. *Angelet*, 255 F. 2d 383 (C. A. 2); *United States* v. *Sheba Bracelets*, 248 F. 2d 134, 144–146 (C. A. 2), certiorari denied, 355 U. S. 904. See also *United States* v. *Palermo*, 258 F. 2d 397 (C. A. 2), pending on petition for a writ of certiorari (No. 471).

While we think petitioner's challenge of the constitionality of the definition contained in this subsecon to be untenable because this is an area of trial ractice which it is proper for Congress, by statute, regulate (see *supra*, pp. 7–8), the question need not e reached here. For in this case the *Jencks*-type maerials which were in fact turned over to the defense ere not limited to "statements" of the type defined subsection (e), but included agent-prepared sumaries (if any) of oral statements made by the witesses to the FBI. In other words the Government, making available to the defense the records of prior tatements to the FBI by the prosecution witnesses ouching upon the subject matter of their testimony, id not limit itself to statements of the kind defined subsection (e), but turned over everything which as conceivably demandable under the *Jencks* decion, without regard to the subsection (e) definition. here is accordingly no basis for petitioner's chalenge of the subsection (e) definition; he is here seekng to argue, in the abstract, a theoretical question hich has no pertinency to the facts of this case.[7]

[7] In neither court below did petitioner contend that he had not een shown documents which he was entitled to see despite the mitations of subsection (e) of the statute. Rather, petitioner onfined his objections to the excision of portions of documents therwise made available to him—a point discussed *supra*, pp. 4–8. ecause this contention was not raised below the Government had o prior occasion to place upon the record the fact which it now serts—*i. e.*, that all relevant documents were made available to etitioner regardless of the subsection (e) limitations of the statute. In *United States* v. *Lev*, *supra*, p. 8, fn. 6, failure to make a ocument available to the petitioner at the trial was held to be armless error because, were a retrial to be ordered, the document ould nevertheless be unavailable to the defense under the new

3. Petitioner, finally, contends that "the application of Section 3500 in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation" because his "alleged crime was committed before the enactment of this statute" (Pet. 28). This contention, however, is made for the first time in this Court, the point having been urged neither in the District Court nor in the Court of Appeals. It is, accordingly, too late to raise the point now. Cf. *Yakus* v. *United States*, 321 U. S. 414, 444–445; Rule 51, F. R. Crim. P. In any event, the point is clearly without substance. Cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593–596; *Beazell* v. *Ohio*, 269 U. S. 167, 170; *Mallett* v. *North Carolina*, 181 U. S. 589, 592–597.

CONCLUSION

For the reasons stated, we do not oppose the granting of certiorari with respect to any question urged in the petition other than that related to the constitutionality of the Jencks Act (18 U. S. C. 3500). With respect to the latter question, it is respectfully submitted that the petition should be denied.

J. LEE RANKIN,
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DECEMBER 1958.

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statute. Here, somewhat the converse situation exists: any supposed defect in subsection (e) has no bearing on this case because petitioner was, in fact, shown all that he would be entitled to see even if subsection (e) were deleted from the statute.

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